United Nations AT/DEC/1218

Administrative Tribunal

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ADMINISTRATIVE TRIBUNAL

Judgement No. 1218

Case No. 1310: FACCHIN Against: The Secretary-General of the United Nations

THE ADMINISTRATIVE TRIBUNAL OF THE UNITED NATIONS,

Composed of Mr. Julio Barboza, President; Mr. Omer Yousif Bireedo; Mr. Spyridon Flogaitis;

Whereas, on 27 January 1997, Brigitte Facchin, a former staff member of the United Nations, filed an Application requesting the Tribunal to "order her reinstatement; respond to requests for contracts for her; re-establish the truth in her file; remove the obstacles she continued to encounter when she tried to enter the United Nations Office at Geneva (UNOG) premises to settle her affairs; pay her salary arrears; and, reimburse her for medical expenses incurred as a result of an incident of 4 July 1994".

Whereas, on 23 July 1999, the Tribunal rendered Judgement No. 919, finding that the Application was time-barred in so far as the decision not to renew Applicant's contract was concerned and referring the claims regarding the 4 July 1994 incident back to the Joint Appeals Board (JAB).

Whereas, on 14 February and 30 May 2003, the Applicant filed applications that did not fulfil all the formal requirements of article 7 of the Rules of the Tribunal;

Whereas, on 8 August 2003, the Applicant, after making the necessary corrections, again filed an Application requesting the Tribunal, inter alia, to:

"(a) *preliminary measures* ...

...

- allow oral hearings ...

- order the production of all documents referred to by the Respondent

(b) ...

1. declare null and void the JAB report since the Panel

- failed to address the subject of the appeal: the **continuing interference** ...

- produced a report which completely disregarded the core issue of the case ...

- disregarded the facts pertaining to the appeal ... and the Applicant's submissions ...

- presented misleading, incomplete and incorrect information.

2. [F]ind that the JAB failed to verify the case it was supposed to examine and to either remand the case to permit a proper examination of the grievance or to find in favour of the Applicant.

3. [Find that the JAB] did not grant the hearings requested by the [Applicant], did not hear witnesses; ... incorrectly claimed this appeal to be part of a previous appeal/[United Nations Administrative Tribunal (UNAT)] judgement and

4. [Find that the JAB] erred in concluding the case time-barred.

(c) ...

[Decide that the JAB] did not comply with its Rules of Procedure and Guidelines ...

(d) ...

- [Pay] compensation for the damage [caused by the failure of the UNOG] to take action to stop the continuing interference and defamation ... and for the ensuing severe moral harm ... and material damage including prolonged unemployment and hardship up to the date of the UNAT Judgement ...

- [A]ward cost

(e) ...

[Order] the Secretary-General to take immediate remedial action to stop the continuing interference and defamation."

Whereas at the request of the Respondent, the President of the Tribunal granted an extension of the time limit for filing a Respondent's answer until 5 February 2004 and once thereafter until 29 February;

Whereas the Respondent filed his Answer on 27 February 2004;

Whereas the Applicant filed Written Observations on 25 June 2004;

Whereas, on 22 November 2004, the Tribunal decided not to hold oral proceedings in the case;

Whereas the facts in the case additional to those contained in Judgement 919, as contained in the report of the JAB read, in part, as follows:

> "... In June 1994, the [Applicant's] supervisor ... [the Chief Economic Commission for Europe/United Nations Conference on Development and Trade (ECE/UNCTAD)], requested that her contract be extended until 31 December 1994, which was also supported by UNCTAD.
>
> ... On 15 July 1994, the [Applicant's] supervisor wrote to the [Applicant] that it was decided that the extension of her contract would be handled by ... UNCTAD. It was also said in this letter that the [Applicant would] continue to perform her duties in that office as before.
>
> ... On 26 July 1994, the [Applicant's] supervisor wrote to [the] Director, Division of Administration in Geneva, referring to the request of the [Applicant's] contract extension, fortifying her excellent performance and disagreeing with the contentions and procedure against the extension.
>
> ... According to the [Applicant], the contract was impeded by UNOG verbally. She claims that [she was] told ... during a telephone conversation on 17 October 1994 that she could not be hired because of the ban on hiring her by the UNOG Administration. ... [N]o written explanation of the ban was given.
>
> ...
>
> ... The [Applicant] claims that in the fall of 1994 she was offered a contract with UNCTAD in New York. While preparing her offer, officials in UNCTAD could not process her contract, as there was a ban on hiring her due to 'bad experience' ... between the [Applicant] and UNOG, according to [the former secretary to the Chief Personnel UNOG].
>
> ... According to the [Applicant], [the former secretary to the Chief Personnel UNOG] played a central role in [the] interference, which occurred orally. ...
>
> ... According to the [Applicant], ... UNCTAD ... said to her on 31 January 1995 that if they were prevented from hiring her twice, there must be something. She claims that [UNCTAD also advised her] that there [had] been several opportunities, but the contract requests were blocked, and that they [could not] hire her, despite the fact that they prepared the documents for her twice.

> . . The [Applicant] claims that [UNOG advised her] ... upon her return to Geneva in January 1995 that she [would] never get a job with[in] the system [because the UNOG Administration had harmed] her reputation.
>
> ... When the [Applicant] applied in 1997 for a post in ... Vienna, ... the Recruitment Section refused to include the application in the list of applications.
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> ...
>
> ... On 28 May 1997 ..., [the] [Chief of Personal Service[, UNOG,] wrote to the [Applicant] that the recruitment freeze had been lifted, and suggested that she ... apply to vacanc[ies] according to her profile. ... [H]er candidature would be given full consideration together with that of other candidates.
>
> ...
>
> On 13 January 1998, the Applicant submitted a request for administrative review."

On 23 July 1999, the Applicant lodged an appeal with the JAB in New York. The JAB adopted its report on 5 November 2002. Its consideration, conclusions and recommendations read, in part, as follows:

> "***Consideration***
>
> 29. The Panel examined the validity of the appeal in compliance with [staff rule] 111.2 (a), (f) and (j). ...
>
> ...
>
> b. Guided by the Staff Rules and the precedents of UNAT, the Panel carefully reviewed the JAB file but was not able to find any exceptional circumstances that could justify a waiver of time limit in the present case.
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> ...
>
> d. The Panel discussed the question of impeding extension of the Appellant's contract, despite her supervisor's request and her excellent performance, and concluded that there was no evidence of an intentional impediment.
>
> e. The Panel referred to the question why her contract was not extended and noted that it was a valid exercise of the Secretary-General's discretion.
>
> ...
>
> g. The Panel referred to the essential question of not extending a contract, and noted that the Secretary-General was not obliged to give any written reason why such an extension is not provided, especially for a short-term contract. ...
>
> 30. The Panel pointed out that no new relevant information was furnished regarding the matter discussed; no further documents, indicating reasons for

not renewing the Appellant's contract or facilitating her with a new one, were provided.

a. The Panel agreed that the contentions the Appellant relied upon were time-barred and therefore could not be considered.

b. The Panel carefully studied the case dossier and although it was very sympathetic with the Appellant's situation, it could find no tangible indications to support the contentions of the Appellant.

Conclusions and Recommendations

31. In light of the foregoing, the Panel *unanimously agreed* to make no recommendation in support of this appeal.

32. The Panel further *unanimously agreed* that an appeal against a decision already appealed should not be accepted, unless additional new relevant information is provided."

On 1 April 2003, the Under-Secretary-General for Management transmitted a copy of the report to the Applicant and informed her as follows:

"The Secretary-General accepts the JAB's conclusions, and is further of the view that, as your appeal was already considered earlier by another JAB and subsequently adjudicated by the Administrative Tribunal, it is *res judicata* and therefore not receivable. In accordance with the JAB's unanimous recommendation, the Secretary-General has decided to take no further action on your appeal."

On 8 August 2003, the Applicant filed the above-referenced Application with the Tribunal.

Whereas the Applicant's principal contentions are:

1. The JAB failed to examine the subject matter of the case and the core issue of the case - the continuing interference and attempts of defamation by UNOG - has not been dealt with.

2. The Applicant's human rights have been violated by the failure of the United Nations to take prompt remedial action to stop the interference and defamation campaign and by denying the Applicant equitable justice.

3. The Applicant has been denied due process and the detrimental effect has been aggravated by the long delay, denying the Applicant relief.

Whereas the Respondent's principal contentions are:

1. The Application concerning events after the Applicant's separation from service is not receivable.

2. The Application concerning non-renewal of the Applicant's contract is *res judicata*.

The Tribunal, having deliberated from 3 to 24 November 2004, now pronounces the following Judgement:

I. The Applicant requests the Tribunal to declare null and void the JAB report as it failed to address the subject of the appeal, that is, the continuing interference and defamation on the part of the UNOG Administration. The Applicant contends that the interference of the Administration led to cancellation of job offers, non-renewal of contracts, and, retraction of firm offers for contracts in Geneva, New York and Vienna. She adds that these multiple attempts to discredit her merits were made orally and that, therefore, she is unable to provide any written evidence.

II. Staff rule 111.2 (a) provides that:

> "A staff member wishing to appeal an administrative decision pursuant to staff regulation 11.1 shall, as a first step, address a letter to the Secretary-General requesting that the administrative decision be reviewed; such letter must be sent within two months from the date the staff member received notification of the decision in writing".

The Tribunal has rigorously emphasized the importance of complying with the mandatory time-limits set out in the Staff Rules (see Judgement No. 498, *Zinna* (1990)). In the present case, the Tribunal notes that the Applicant has not served as a staff member since July 1994, other than for a short period between October and December of 1994.

Article 2 of the Statute provides that the Tribunal shall be open:

> "(a) To any staff member of the Secretariat of the United Nations even after his employment has ceased, and to any person who has succeeded to the staff member's rights on his death;
>
> (b) To any other person who can show that he is entitled to rights under any contract or terms of appointment, including the provisions of staff regulations and rules upon which the staff member could have relied."

The established jurisprudence of the Tribunal confirms that the Tribunal is only open to appeals from staff members and former staff members relating to alleged non-

observance of their contracts of employment. Tribunal Judgement No. 575, *Burtis* (1992) provides in paragraph V that:

> "The Tribunal is only open to the staff and former staff who file appeals relating to alleged non-observance of their contracts of employment. In the present case, the Applicant cannot allege the non-observance of a contract of employment, because such a contract does not exist."

The Tribunal cannot but agree with the JAB that, as a former staff member complaining about the non-selection for positions to which she applied subsequent to her separation of service, the Applicant has no standing before the Tribunal.

III. With regard to the issues of interference and defamation, the Tribunal notes that the Applicant's allegations are based solely on oral statements, and that she is unable to provide any written material in support of such allegations. While there may be cases where an Applicant is able to substantiate oral statements made to him or her, the Tribunal finds that the Applicant has not done so in this case. As the Tribunal has consistently held, the burden of proof rests with the party making the allegation: in the present case, the Applicant has failed to carry same (see Judgement No. 672, *Burtis* (1994)). Thus, this claim must also fail.

IV. The Applicant also claims that the recruitment criteria set out in Article 101.3 of the United Nations Charter and in the Staff Regulations and Rules governing placement and promotion have not been taken into account in her case. In this regard, the Tribunal notes that the JAB had considered these issues in 1996, and the Tribunal in Judgements No. 919, *Facchin* (1999) and No. 995, *Facchin* (2001). In all these instances, her appeals were rejected and, therefore, as the Tribunal stated in paragraph V of Judgement No. 1111, *Miller* (2003), these claims are *res judicata* and not subject to further appeal:

> "The Tribunal will finally deal with the Applicant's attempts to reopen issues raised in his earlier Application in 1992, resulting in Judgement No. 623. According to the Applicant, several of the pleas contained in that Application were not examined by the Tribunal, and thus he requests the Tribunal's permission to resubmit those pleas for its consideration. The Tribunal notes that it had considered these pleas in Judgement No. 623 and had decided to reject them. Thus, these pleas are considered to be *res judicata*, and, therefore, are not subject to further appeal."

V. In view of the foregoing, the Application is rejected in its entirety.

(*Signatures*)

Julio **Barboza**
President

Omer Yousif **Bireedo**
Member

Spyridon **Flogaitis**
Member

New York, 24 November 2004

Maritza **Struyvenberg**
Executive Secretary